U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 February 2007

Case No: 2006-LHC-01485
OWCP No.: 5-118648

In the Matter of:

F.B.,
Claimant,

v.

CERES MARINE TERMINALS/
CERES MARINE TERMINALS, INC.
Employer/Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest

Appearances: The Claimant, *pro se*

Lawrence P. Postal, Esq.
For the Employer

Before: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER – DIRECTING ADJUSTMENT FOR UNDERPAYMENT OF DISABILITY COMPENSATION BENEFITS AND DENYING REQUESTED REINSTATEMENT OF BENEFITS AND PAYMENT OF MEDICAL BILLS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended (Act), 33 U.S. Code, Title 33, § 901 et seq., and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 18, and Title 20, Chapter VI, Subchapter A.

A formal hearing was held in Newport News, Virginia, on October 5, 2006, at which time the Claimant[1] appeared without a representative. The Claimant was advised of his right to be represented by an attorney licensed to practice law or an individual who could assist the Claimant during the proceeding; the right to present documentary evidence and evidence through testimony under oath; the right to ask questions of witnesses called to testify by the Employer; the right to enter into agreements of facts with the Employer; the right to respond to the evidence submitted by the Employer; and the opportunity to make a statement after all the evidence is in as to the Claimant's understanding of the case. The Claimant was also provided with the telephone number of the Virginia Lawyer Referral Service and advised that he would be given a continuance for a period of time to talk to a representative if he desired. The Claimant elected to proceed with the hearing without a personal representative present.

The parties were afforded full opportunity to present evidence and argument as provided in the Act and applicable regulations. The Director did not appear. At the hearing, Administrative Law Judge exhibit 1 through 3, Claimant's exhibits 1 through 12 and Employer's exhibits 1 through 29 and 31 to 54 were admitted without objection. (TR 5, 9, 54, 11 and 39, respectively.)[2] The post-hearing written brief filed by the Employer's counsel dated December 1, 2006, and Claimant's letter dated October 18, 2006, were also considered.

The findings of fact and conclusions which follow are based upon a complete review of the entire record, in light of argument of the parties, as well as applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

At the hearing, the parties stipulated to, and this Administrative Law Judge finds, the following as fact:

1. The Claimant suffered a right foot injury on May 8, 2004.

2. The Claimant's injury arose in the course of and out of his employment with Employer.

3. The Claimant's injury occurred while Claimant was loading and unloading a ship and is within the scope of the Act.

ISSUES

The issues remaining to be resolved are:

1. Whether Claimant is entitled to permanent partial disability benefits under the Act.

[1] After August 1, 2006, the Department of Labor policy requires the use of initials for claimants' name in the headings and use of a descriptive title in the decision. Accordingly, "Claimant" is used in this decision instead of the proper name of the individual who is the subject of this decision.

[2] The following exhibit notation applies: ALJX – Administrative Law Judge exhibit; CX – Claimant exhibit; EX – Employer exhibit; TR – transcript page

2. Whether the Claimant is entitled to permanent total disability benefits under the Act.

3. Whether the Claimant is entitled to continuing medical care and treatment based on his May 8, 2004, right leg injury.

PARTY CONTENTIONS

Claimant's Contentions:

The Claimant submits that the Employer wrongfully terminated disability benefits and medical care in December 2005 and has denied him continuing medical attention since that date. The Claimant argues that the Employer has submitted evidence to show a point of maximum medical improvement but has not shown that continued medical care is not needed. The Claimant also argues that the Employer has failed to establish work he could do with his medical problems arising out of his May 8, 2004, injury. The Claimant seeks reinstatement of disability benefits, coverage for continued medical expenses and treatment, and reimbursement for medical expenses paid by Claimant.

Employer's Contentions:

The Employer, through counsel, argues that the Claimant has reached maximum medical improvement with a permanent 19% disability rating for the right foot injury and is thus only entitled to a scheduled award limit under the regulations, which the Employer has paid. The Employer submits that the Claimant is not totally disabled and can perform other jobs that exist in the local economy and consistent with a February 17, 2005, functional capacity evaluation. Employer states Dr. Warren performed surgery on October 5, 2004, to repair the Claimant's torn foot tendon, opined that the Claimant had reached maximum medical improvement on March 14, 2005, assigned a 19% disability rating to the right foot, and opined that the prior right foot fracture had completely healed by May 19, 2005. The Employer submits that Claimant has failed to show that additional medical treatment is needed.

SUMMARY OF RELEVANT EVIDENCE

Testimony of Claimant (TR 12 – 52)

During examination by this Administrative Law Judge, the Claimant testified that since the surgery on his right foot, it has not healed properly and is getting worse by limiting movement, and causing pain and discomfort. He stated that the surgery was done by Dr. Quidgley on the right ankle area on October 5, 2004. He reported that Dr. Quidgley refused to treat him any further somewhere around three or four months after surgery. The Claimant testified that he cannot walk any long distances, like 100 steps, without some support like crutches and that the pain and limits on movement are constant. He indicated that he tried using a straight cane for support when recommended by Dr. Quidgley, but the cane did not work for him.

The Claimant testified that Mr. Arehart wanted to meet every Thursday to try to get a job for him, but his medical health was down and he lacked gas money to meet every Thursday. The Claimant stated that on one occasion he was to interview with Dominion Pizza Hut, called the supervisor to find out about hiring practices, could not get an explanation of the hiring practices, explained his condition, and was told to come on out for the interview. He reported that he then called another Pizza Hut and was told about hiring practices that were different. He then called the original Pizza Hut supervisor and was told that he did not have to come out to the store for an interview if he did not want to work.

The Claimant testified that statements in Employer's exhibits were false as to all the insurance company doctors and "the treating doctors . . . have failed to live up to their responsibilities . . . the doctors [told] the insurance companies that I was able to work, and as a result . . . the insurance companies decide that I no longer need disability payments and medical care as a result of the doctors telling them I was able to go to work." He stated he confronted Dr. Warren about why he changed his status to maximum medical improvement and was told the insurance company did it. He stated Dr. Warren told him there was nothing else he could do so he started passing the Claimant from one doctor to another.

The Claimant testified that he saw Dr. Lisa Barr one time for pain management and she refused to see him again. He then treated for about a year with Dr. Quidgley without a whole lot of problems, except those created by the insurance company. He also saw Dr. Mansheim for a "psych eval or something" lasting 30-40 minutes and resulting in a 12 page report. Dr. Mansheim said that "I could go to work, nothing was wrong with me." He stated that he was referred to Dr. Ross, who wrote a 15 page report after 30-40 minutes stating: "there was nothing wrong with me, I could go to work, and I didn't need any further medical treatment." The Claimant testified that since the surgery, he has been passed from doctor to doctor who "write reports against me stating I didn't need any further medical treatment and that I could work," which is wrong.

The Claimant testified that he feels he cannot work because "my right ankle needs proper medical treatment . . . and the foot is getting worse."

The Claimant testified that he needed help writing ALJX 4 because "I don't write too well."

On cross-examination by the Employer's counsel, the Claimant testified that he sought medical care on his own after he was cut off by the Employer. He stated that he saw Dr. Stanley Mes, a foot specialist in Richmond, Virginia, one time and that he would not treat him again. He stated he also got the same treatment from Dr. Mullinax in Richmond, Virginia, who had referred him to Dr. Mes. He stated that the last time he saw Dr. Mes was around May 2006.

He agreed that he gave a deposition to the Employer's counsel on September 13, 2006. The Claimant testified that the Employer's counsel knew of Dr. Mullinax before he saw him because the Employer's counsel knew that Dr. Quidgley referred him to Dr. Mullinax. He reported that the first doctor he saw was Dr. Cohn who referred him to Dr. Warren, a foot specialist. He testified that Dr. Warren preformed surgery on his foot and dropped him as a patient a few months after surgery because Dr. Warren said he had reached maximum medical improvement.

Dr. Warren then referred him to Dr. Barr, who refused to treat him, and then to Dr. Quidgley-Nevares after the Labor Board assisted him in contacting Dr. Warren again. He stated that Dr. Quidgley stopped treating him after he reviewed Dr. Mansheim and Dr. Ross's reports and agreed with them. He testified he did not refuse injections in his feet from Dr. Quidgley but explained to Dr. Quidgley he wanted to wait until after examination by Dr. Mullinax in Richmond. The Claimant denied ever refusing treatment from any physician and denied being rude to Dr. Quidgley or his staff.

The Claimant testified that Dr. Quidgley referred him to Dr. Mullinax and that Dr. Mullinax referred him to Dr. Mes. He reported that after a CAT scan of his foot, Dr. Mes stated arthritis had set in and he might be able to help with surgery but could not guarantee anything. He reported that Dr. Mes would not write a prescription for Percocet and returned him to Dr. Mullinax.

The Claimant testified that he completed a functional capacity evaluation at one point and was assigned a 19% disability rating by Dr. Warren. He stated Dr. Quidgley advised he could do some work sitting down but that he "wasn't able to go look for no jobs at that point." He stated that "once they kept harassing me about going and look for jobs, I took it upon myself to go and find jobs" on the list (CX 12). He reported that he is on file with the Virginia Employment Commission. He also reported that he did not use the newspaper want ads but did use a list of jobs provided by the Employer.

The Claimant reviewed EX 32 concerning the pizza shop interview and reported that he and the supervisor discussed the use of a touch-screen computer, the store providing simple training, and his report that he could not perform any work with computers. He reported that EX 32 involved the same job interview that Mr. Arehart was supposed to drive him to. He later testified that he told the individual that he could not be active enough, at that time, to hold down a job.

The Claimant testified that he "was trying to figure out why . . . Mr. Arehart was trying to get me a job in my condition, after I explained my conditions to him and told him how bad off I was, [and] that I wouldn't be responsible for trying to get to a job every day." He stated "[m]y whole . . . belief is that I stand in need of some medical treatment, desperately, that I wasn't receiving; that it was on notice to you-all that I was in need of medical treatment and you-all would deny me medical treatment, so I had to find out and seek out the medical treatment on my own for my health. I wasn't able to hold down no job." He reported that he had told this to Mr. Arehart many times.

The Claimant reported that when he did go look for a job he was on crutches and would say he could do a sitting down job. He stated that when he explained why he was on crutches there would be no job available. He stated that the employers he went to and told why he was on crutches is on the list of jobs he gave to the Court (CX 12). He testified that "I was forced to go look for jobs. I [shouldn't] have been looking for a job. I was looking for some medical attention for my problems. That's what I needed to be doing." He reported that when he went to different jobs he was on crutches and told them he "was not able to be reliable and responsible enough to maintain a job."

The Claimant reported that he got two letters offering a job working for Ceres doing light-duty painter and power-washing jobs (EX 47 and 48) and was confused by them. He reported that he called Mr. Parker as requested by the letters sometime after his deposition, that Mr. Parker said he had to talk to the Employer's counsel first, and that Mr. Parker never called back. He stated that his last job was not that of light-duty painter.

The Claimant testified that Dr. Ross was the last Employer-provided doctor he saw. He stated that Dr. Ross said he did not need any further medical treatment and could do anything, whereas prior to that, the doctors had said he was only able to do sedentary work. He reported that he thought Dr. Quidgley had also approved the light-duty painter job.

After the close of the Employer's case-in-chief, the Claimant stated that both Dr. Quidgley and Dr. Ross approved job descriptions without consulting with him about whether he could perform the jobs and is not satisfied with the way he was treated by the insurance company's physicians.

Testimony of Mr. Claude Arehart (TR 55 – 75)

On direct examination, Mr. Arehart testified that he is a vocational case manager who works for General Management Solutions, Inc. and that he assists individuals with vocational services, including guidance counseling and employment job placement. Prior to his current job, he worked with the Virginia Department of Rehabilitation Services for approximately 26 years as a vocational counselor.

The witness reported that the Claimant's first vocational case manager was Ms. A. Bouchard and that he took over the Claimant's case about February 23rd. He stated that he had met with the Claimant several times and was aware that the Claimant had a seventh grade education and had been given sedentary level work restrictions by Dr. Quidgley. He reported that all the jobs listed on pages 2 and 3 of EX 17 were sedentary exertion level jobs and that they would be appropriate for the Claimant for that reason. He reported the listed jobs were all entry-level jobs that provide training, have minimal requirements for physical and educational activity, and pay approximately the minimum wage rate, excluding the van driver. He stated that employers usually have no difficulty filling the minimum wage jobs and that employees hired are usually of limited education, have work restrictions that may be severe, and have limited transferable skills.

The witness testified that the jobs listed on EX 24 were also appropriate for the Claimant because the jobs listed were sedentary positions, they provided training, and the individual can stand and walk at their convenience depending upon their disability. He reported that those jobs also paid minimum wage rate.

The witness testified that he informed the Claimant that Dr. Quidgley had approved him to go back to work and that the Claimant responded by stating that he was seeing another physician, could not go back to work, and had medical problems that were not being taken care of by Dr. Quidgley. He stated the Claimant seemed more concerned with the other physician saying he could work than with Dr. Quidgley. He testified that he had not seen any medical reports that indicated the Claimant could not work.

The witness testified that he met with the Claimant five or six times and he never indicated a willingness to work, but instead stated he could not work. He reported that he completed one job application for the Claimant, but the Claimant would not complete the other applications and said to send them to Ms. Ford. He stated that he investigated the job search list provided by the Claimant (CX 12 and EX 50) and found the Claimant had not submitted a job application to any of the employers, the employers did have job openings at the time, and some of the job openings were not within the Claimant's work restrictions, such as the warehouse person and customer service representative that required too much lifting, standing, and walking for the Claimant. He reported that the job with Texaco would have been an appropriate job for the Claimant.

The witness testified that he had seen the Claimant with his crutches many times, and he would put weight on the crutches when he stopped walking but not while he was walking. He would carry the crutches when he walked and maybe use them for balance, but would not use them like someone with a broken leg would use crutches to ambulate.

On cross-examination, the witness examined the job descriptions in EX 47 and 48 and stated that he did not think those jobs, as described, would fall within the work restrictions placed by Dr. Quidgley. He testified that he did not pick the Claimant up for the pizza shop job interview since he did not receive a response from the Claimant to the letter in which he offered to drive the Claimant to the interview because he did not have any money. He stated that he did meet with the Claimant at the local library earlier the same day as the pizza shop interview. He reported he did not recall the Claimant calling him the day of the interview to come pick him. He testified he had talked with Ms. D. Wanser, the manager at the pizza shop, and she reported the Clamant had called her at the pizza shop rather than go to the shop and had told her he could not perform the job duties. The witness stated that the Claimant had reported to him that Dr. Quidgley stated he could not be a pizza order-taker even though Dr. Quidgley had approved that job description.

On re-direct examination, the witness testified that the job with Ms. Wanser was at the Domino's Pizza on Hampton Boulevard. He stated that if Dr. Quidgley approved the light-duty painter's job, the Claimant would have no problem performing that job.

On re-cross examination, the witness testified that had Dr. Quidgley approved a light-duty painter job, he would have taken the Clamant to the job.

Medical Record Entries from Sentara Norfolk General Hospital (CX 1)

CX 1 contains the report of a September 2, 2006, MRI of the right lower extremity following a complaint of right ankle pain, status-post partial excision of the right distal anterior peroneus brevis. There was subcutaneous edema on the medial and lateral ankle without fluid collection, focal thickening of soft tissues at the surgical repair site and focal segment of the peroneus tendons without intrinsic signal abnormality or findings to suggest an acute repair. There was a small cyst within the anterior calcaneal process superiorly but no surrounding inflammation. There was a minor chronic thickening in tear talofibular ligament. The remainder of the findings were within normal limits or unremarkable. The impression reported by Dr. A. Specht was stable interval of post-operative findings, no tenosynovitis and no acute tendon tear.

Medical Record Entries from Sentara Norfolk General Hospital (CX 2)

CX 2 contains the report of a July 29, 2006, MRI of the right ankle status-post peroneal tendon repair. The peroneus tendon complex was moderately thickened with flattening and possible longitudinal split of the peronus brevis. A small subcortical cyst formation was identified in the subtalar region of the calcaneus. The remainder of the findings were within normal limits or unremarkable. Dr. K. Park's impression was abnormal thickening of the peroneal tendon complex with flattening or possible tear of the peronus brevis tendon, status-post tendon repair and focal susceptibility in the lateral aspect of the right distalfibular metaphyseal region. It was unclear if the brevis tendon split-tear was related to surgical intervention or a new finding.

Medical Record Entries from Sentara Leigh Hospital (CX 3)

The Claimant presented to Sentara Leigh Hospital emergency room on July 18, 2006, ambulatory and complaining "multiple complaints, aches from foot to shoulder" and right ankle pain secondary to a two year old injury with the pain worsening and swelling that night. He reported he was "new to the area. Wants an explanation why his ankle had not healed in two years and wants all of his medications refilled as he does not have an MD." Examination showed mild distress, skin within normal limits, ankle swelling below the right ankle surgical scar, normal right foot and toe range of motion, normal right foot neurological exam, and perfusion with mild tenderness rated 1/4. X-ray of the right ankle showed no fracture or dislocation, and medial and lateral significant soft tissue swelling without an acute abnormality. The clinical impression/diagnosis was chronic right ankle swelling with a history of right ankle surgery. The Claimant was discharged with a prescription for 12 Vicodin tablets and recommendation to elevate the right ankle. It is specifically noted that the address provided to the hospital on July 18, 2006, is the same address reported on the "Injury and Illness Incident Report" of May 8, 2004, in EX 2.

Medical Record Entries from Sentara Leigh Hospital (CX 4)

The Claimant was treated at Sentara Leigh Hospital on May 21, 2006, for complaints of "pulsating/throbbing" right foot pain and swelling for two to three months with increased pain and swelling the last six hours. Examination localized the swelling and 1/4 tenderness to the top of the ankle area. The neurological examination, range of motion and perfusion of the right foot was normal. X-rays indicated modest diffuse soft tissue swelling of the calf, ankle and foot; modest degenerative changes at the first metatarsal phalangeal joint; moderate loss of the longitudinal arch and small plantar calcaneal spur. No bony abnormalities were present. The clinical impression/diagnosis was foot arthralgia. The Clamant was placed on crutches and told to wear an ortho-shoe on the right foot for seven weeks and see podiatry if symptoms increased.

Medical Record Entries from Sentara Leigh Hospital (CX 5)

The Claimant treated at Sentara Leigh Hospital on March 10, 2006, for complaints of right foot pain. The Claimant reported that he had a right ankle fracture two years prior; that he was awaiting a referral to a doctor in Richmond, Virginia; that "he can't wear air splint because ankle is too big", and that "he can't take anything but Percocet." Examination showed mild distress,

partial weight bearing, 4/4 tenderness over the right ankle area, and limited right foot range of motion secondary to pain limitation. X-rays of the right ankle revealed prominent bimalleolar soft tissue swelling and a small calcaneal spur. There were no fractures, subluxation, lesions or significant degenerative changes noted. The clinical impression/diagnosis was acute exacerbation of chronic right ankle pain. The ankle was placed in an ace wrap and he was instructed to wear an ortho-shoe for two weeks. Naprosyn was prescribed.

Medical Evaluation Report of Dr. C. Lorestani (CX 6)

On September 20, 2006, physician C. Lorestani completed a Commonwealth of Virginia, Department of Social Services, medical evaluation form. Dr. Lorestani indicated that the evaluation was based on a September 8, 2006, medical examination. The diagnosis was "subtalar joint degeneration and neuritis expected to last three months. The restrictions identified included no bending, standing, walking or driving; no placing of light items on shelves higher than head level. The opinion indicated that the "patient unable to work for long periods of time" but would be able to work at the end of the three month treatment period if no complications. No limitations were placed on job searching, job skill training, education or job readiness training. It is noted that no underlying September 8, 2006, medical examination has been submitted as evidence for consideration. Accordingly, the soundness and medical basis of Dr. Lorestani's opinions and limitations can not be evaluated for consistencies, discrepancies, or deficiencies.

Medical Report of July 24, 2006, 3-phase Bone Scan of Right Lower Extremity (CX 7)

On July 24, 2006, the Claimant underwent a 3-phase bone scan of the right lower extremity ordered by Dr. S.J. Mest to evaluate possible fracture of the right foot. The bone scan indicated normal blood flow, mild increased tracer accumulation in the lateral aspect of the right ankle, mild increased tracer activity in the right lateral malleolus and base of the right great toe. The impression was that the tracer accumulation in the right great toe likely represented degenerative change and the other tracer accumulation may represent a healing fracture.

Medical Report of May 31, 2006, by Dr. P.F. Mullinax, M.D. (CX 8)

On May 31, 2006, the Claimant was seen by Dr. P.F. Mullinax upon referral by Dr. A. Quidgley-Nevares, M.D., for evaluation of musculoskeletal problems. The Claimant reported lower back pain and muscle spasms following aquatic physical therapy which overworked him. The Claimant reported ongoing pain problems, troubled gait, sleep problems, and a mood problem. The Claimant reported being on Endocet three or four daily for two years, Lyrica bi-daily of uncertain help, Effexor daily, and Lidoderm which "helps a little bit." He reported that foot surgery in October 2004 was of no help. Review of the Claimant's systems indicated right foot problems, left foot and leg problems, right shoulder problems, some problem with his chest or heart pain, and shortness of breath. Examination revealed weight at 336.8 pounds, blood pressure at 153/67, large turbinates, clear lungs, right sacroiliac area pain not accentuated much on exam, and tenderness, pain, and swelling in the right foot. The impression was chronic pain problem. The plan of care was referral to a podiatrist or foot surgeon for evaluation, laboratory work to rule out inflammatory rheumatic disease, and return in two months.

Commonwealth of Virginia TANF Form (CX 9)

CX 9 is a Commonwealth of Virginia TANF form indicating that the Claimant's case number had made a one-time $75.00 payment for medical assistance.

Sentara Hospital Report of September 20, 2006 (CX 10)

CX 10 is a one page printout indicating that the Clamant was scheduled to be seen for an "IM Visit" on October 27, 2006, and for a "Podiatry" visit on November 1, 2006.

Department of Labor Form LS-209 dated May 24, 2006 (CX 11)

CX 11 is a standard Department of Labor Form LS-209 advising the Claimant that his employer and/or insurance carrier objected to his claim filed for disability compensation. The attached Form LS-207 indicated that the Employer disagreed with paying "any and all further medical care based on the reports of Dr. Mansheim and Dr. Ross."

Work Search Record (CX 12)

During the Claimant's testimony he referred to a list he made of various jobs he sought. The list was admitted as CX 12. CX 12 indicates that the Claimant "walked-in" at various businesses to inquire about work positions. He indicated that he did not place an application for work with any of the contacts. The list further indicates:

April 12, 2006	Bosch	Not hiring
" " "	Contract Carpet	" "
" " "	COX	" "
" " "	Gilninger (sic)	No jobs
" " "	Pepsi	Apply online
" " "	Mobil	No work
" " "	Hills Texaco	Not hiring
April 24, 2006	Crown	" "
" " "	Days Inn	No computer skills
" " "	Drive Time	" " "
" " "	One Stop Cellular	" " " for phone sales
April 26, 2006	Enterprise Car Rental	Too many medical restrictions for car prep / driver
" " "	BP	No computer skills for cashier
" " "	Budget Car Rental	No need for driver only two hours a day
" " "	Central Parking	Nothing available for parking lot attendant
" " "	Domino's Pizza	Unable to fulfill job requirement for driver
April 28, 2006	Hope Thrift Store	Unable to perform work as driver / sales assistant
" " "	Mission Thrift Store	Not hiring cashiers

Department of Labor Form LS-208 (EX 1)

The completed Form LS-208 dated January 4, 2006, indicates the Clamant sustained a right foot injury on May 8, 2004, while working for the Respondent Employer. The Claimant's average weekly wage at the time was $946.41 which yielded a maximum compensation rate of $630.94 per week. The Claimant was paid temporary / total disability from May 9, 2004, through April 4, 2005, inclusive, at a weekly rate of $630.94, for a total amount of $29,834.45. The Claimant was assessed with a 19% permanent / partial scheduled loss under the regulations for the foot and was paid $630.94 per week for a period of 38.950 weeks, which totaled $24,575.11. The last payment was made January 4, 2006. The total of disability payments made was $54,409.56

Injury and Illness Incident Report (EX 2)

EX 2 is a one page report completed May 8, 2004, indicating that the Claimant reported twisting his right foot and ankle while walking from one hatch to another to unlock a container on the deck of M/V YM Milano. He reported that his right foot became caught between turnbuckles when he went under a rope. The Claimant was seen at DePaul Medical Center emergency room and was referred to ortho for follow-up. No fracture was indicated. The Claimant's indicated home address is the same as that of record.

Department of Labor Form LS-202 (EX 3)

The completed LS-202 form dated May 10, 2004, indicates that the Claimant was performing his normal work assignment at a marine terminal under the Longshore and Harbor Workers' Compensation Act when he sustained a right foot strain onboard the M/V YM Milano on May 8, 2004, which caused him to lose work beginning May 9, 2004. The Claimant was authorized medical attention and selected his "first treating physician" indicated as Dr. S. Cohn of Norfolk, Virginia.

Department of Labor Form LS-206 (EX 4)

The completed LS-206 form dated May 17, 2004, indicates that the Claimant's disability compensation date began May 9, 2004, at a compensation rate of $581.11 per week based on an average weekly wage of $871.66. It is noted that these amounts are less than that reported paid to the Claimant in EX 1.

Department of Labor Form LS-207 (EX 5)

The completed LS-207 dated October 5, 2005, indicates that the Claimant was then alleging right knee, left foot and low back pain, and the Employer controverted the causal relationship to the right foot injury of May 8, 2004.

Hampton Roads Maritime Association Work/Pay Printout (EX 6)

EX 6 is a detailed printout of the number of hours worked and the pay received by Claimant for the period May 8, 2003, through May 8, 2004. The exhibit indicates the Claimant received $44,232.95 for 184 days of work during that one year period.

Medical Records Related to Cervical Spine (EX 7)

EX 7 contains an October 2, 2001, report of a cervical spine MRI by MRI & CT Diagnostics of Virginia Beach. The report was upon referral by Dr. P. Warren, M.D., for evaluation of suspected herniated nuclear pulposus related to complaints of left neck and shoulder pain. Mild disc dehydration without disk height loss and mild angular bulging were reported at levels C4-5 and C5-6. A Chiari I malformation at level C1 was also reported.

A subsequent evaluation by Dr. M. Kerner on November 9, 2001, records that the Claimant reported constant neck pain, arm and leg pain, and a sense of weakness since "a container landed hard on his Hustler, spraining and jarring his neck." Examination showed no apparent distress, very vocal with pain complaints standing and moving, normal strength, hypersensitivity to light touch on the back, equivocal straight leg raise testing both sit and stand, grinding sensation in neck and back, antalgic range of motion in the back, and no palpable spinal spasm. X-rays of the lumbar and cervical spine were normal, as was the October 2, 2001, cervical MRI. The EMG of the upper extremities and right leg were also reported as normal. Dr. Kerner reported that he saw "no evidence of objective pathology either on exam or radiographic study" and is "without any objective finding consistent with his injury." He reported that the Claimant requested stronger narcotic pain medications which were considered "inappropriate at this point." The plan of care was for strengthening and work hardening physical therapy followed by a functional capacity evaluation.

A functional capacity evaluation was completed on December 6, 2001, by a physical therapist. The physical therapist reported "[o]verall test findings, in combination with clinical observations, suggest the presence of sub-maximal effort on [Claimant's] behalf . . . that [Claimant] can do more physically at times than was demonstrated during this testing day. . . . Overall test findings, in combination with clinical observations, suggest considerable question be drawn as to the reliability/accuracy of [Claimant's] subjective reports of pain/limitation . . . Significantly more weight should be placed upon objective findings verses subjective reports. . . . [The Claimant] can do more at times than he currently states or perceives." The physical therapist reported that, "[d]ue to [Claimant's] lack of full physical effort and significant degree of symptom magnification, I am unable to provide an accurate estimate of his maximal physical abilities and limitations at this point. Despite these factors, [Claimant] demonstrated the ability to perform all critical job demands for his position of crane operator." The report indicated Claimant lifted 23 pounds of weight, carried 23 pounds of weight, could sit an entire workday, could stand and walk up to 1/3 of the workday, could climb a ladder, and could bend at the waist for up to 1/3 the workday.

A neurological evaluation was performed by Dr. A.J. Barot, M.D., on December 21, 2001. The Claimant reported neck pain into the right upper extremity and lower back pain into the right

lower extremity from a September 4, 2001, neck and back strain and jarring when a container landed hard on his hustler. Examination indicated that the Claimant weighed 280 pounds, was grossly obese, alert, and oriented times three. Motor strength was normal in all extremities without atrophy or fasciculations. There was no sensory loss. Straight leg raising was limited at 80 degrees. Tenderness and spasm was reported in the cervical and lumbar regions. The Claimant could stand and walk within normal limits. Dr. Barot reported some embellishment and a need for additional physical therapy and electrodiagnostic testing, which was done on December 28, 2001. On March 7, 2002, Dr. Barot saw the Claimant and reported no abnormality on exam. He had "not been able to find any definite pathology," did "not have anything specific to offer from a neurological point of view," and released the Claimant to "return to full work".

Family nurse practitioner A. Wilkins reported on March 18, 2001, that the Claimant continued to complain of chronic neck and back pain, "on physical exam, he is neurologically intact", and that "this patient is at maximum medical improvement. He was given full duty release back to work after his neurological exam by Dr. Barot. He was last seen by Dr. Kerner on 12/18/01, at which time he had an FCE and Dr. Kerner released him back to full duty. The patient states that he has not returned to work as of yet and wishes to be setup on a chronic management program."

Also included in EX 7 is a copy of an April 5, 2002, script from Dr. Sidney S. Loxley, M.D. stating that the Claimant" has been unable to work since his injury of 9/4/01 and is under my care and is to remain out of work." No supporting medical information or further physician identification is included in the exhibit.

Medical Records Related to Motor Vehicle Accident of April 26, 2002 (EX 8)

EX 8 indicates that the Claimant was seen at Sentara Norfolk General Hospital with complaints of neck and back pain as well as right foot numbness and left arm and hand tingling following a "very low speed impact" motor vehicle accident on April 26, 2002, as the restrained driver. Examination indicated mild tenderness in the cervical spine at the C3 to C5 level, no severe point tenderness, and moderate tenderness in the lower lumbar spine and lateral paraspinal muscles. Neurologically he was considered intact. He could flex, extend, and laterally rotate his neck with some discomfort. X-rays of the cervical and lumbar spine indicated normal alignment and no fracture. He was prescribed Vicodin and Flexeril as needed for pain. When examined the next day, the cervical, thoracic, and lumbar spine areas were non-tender, while the trapezius muscles were tender bilaterally. There was good range of motion in the right wrist, elbow, shoulder, ankle, knee, and hip. Strength and sensation were intact. He had a normal gait. Four days after the motor vehicle accident, his grip strength was 20 pounds bilaterally and he had restricted range of motion in the neck with muscle tightness and tenderness, no upper extremity reflexes, left shoulder tenderness, paralumbar muscle tightness and tenderness with forward bending to touch his knees, negative straight leg raising bilaterally, and mild bilateral ankle swelling. He was diagnosed with cervical and lumbar strain, left ankle and right foot sprain, and left shoulder contusion. He was prescribed three weeks of physical therapy.

The Claimant had two sessions of physical therapy and requested a cane for worsening back pain. His back findings were not improved and he was prescribed a single point cane, advised to

remain out of work, continue physical therapy, and given samples of Vioxx and Ultracet. He progressed slowly and required a lumbosacral injection for lower back pain. By the end of May 2002, he was in a rehabilitation program which was to increase to work conditioning. He was released with work restriction but did not return to work because of complaints of neck and back pain. In mid-June 2002, he was taken out of work and had physical therapy reduced to every other day due to pain, limited cervical range of motion and pain radiating into the lower back. He required another trigger point injection. A June 25, 2002, lumbar MRI revealed narrowing and loss of signal intensity at the L5-S1 level and bilateral foraminal narrowing without central stenosis. Physical therapy was reduced to three times per week. Non-surgical treatment was recommended in August 2002, and a functional capacity evaluation was completed on August 13, 2002. During the functional capacity evaluation the Claimant "was consistent on both days of testing with self-limiting behaviors secondary to elevated pain levels . . . There [were] no overt pain behaviors noted. [Claimant] would calmly withdraw from the tasks and say that the task was either 'killing him' or 'that he could not take it anymore.'" The physical therapist classified the Claimant's capabilities in the sedentary range

On October 1, 2002, the Claimant was released to full work activities. Follow-up examination October 22, 2002, revealed no tenderness and that the Claimant had returned to work full duty.

Medical Records of Orthopaedic Associates of Virginia (EX 9)

The Claimant was seen by Dr. S.L. Cohn, M.D., on May 11, 2004, for complaints of pain over the medial and anteromedial portion of his right ankle following a twisting injury at work on May 8, 2004. Examination of the right lower extremity revealed normal alignment, significant ankle swelling into the foot, tenderness, and intact Achilles tendon. X-rays did not demonstrate a fracture. He was diagnosed with contusion and ankle sprain. He was placed in a walking orthosis, prescribed physical therapy and Bextra, and taken off work. Dr. Cohn continued the Claimant off work on May 25, 2004, after examination revealed decreased swelling and continued sharp dorsal right foot pain.

A May 27, 2004, right foot MRI revealed a small anteroinferior talar subarticular fracture and peroneus longus tendon partial thickness tear. He remained out of work and was referred to Dr. P.D. Warren, M.D., for a surgical consult. Dr. Warren recommended remaining in the fracture boot full-time and reevaluate in one month. On July 14, 2004, Dr. Warren examined the right ankle, found ankle and tendon tenderness, and ordered another MRI examination. The July 17, 2004, right foot MRI showed the fracture no longer visible but the short segment longitudinal split tear of the peronus brevis tendon was still identified. He was prescribed three weeks of physical therapy.

On August 3, 2004, Dr. Cohn found the Claimant capable of sedentary work and again referred him to Dr. Warren for surgical evaluation of the right ankle. Dr. Warren recommended surgical exploration of the peroneal tendons on August 11, 2004. On October 5, 2004, surgery revealed a partial tear of the anterior third portion which was too small to be repaired, so it was excised. He was prescribed Percocet for pain after surgery. He was permitted to progress to weight bearing on crutches on October 21, 2004. He progressed to an air cast on November 18, 2004, and was prescribed physical therapy for range of motion and strengthening. He was in TED stockings

and foam shoe inserts on December 16, 2004. Physical therapy three times per week was continued. On February 10, 2005, Dr. Warren opined the ankle was doing well, there was nothing further to offer medically and that a functional capacity evaluation should be completed for a final impairment rating. A functional capacity evaluation was done on February 17, 2005, which reported "less than full physical effort and a significant degree of symptom magnification" and limitation to "a sedentary physical demand level job." On March 14, 2005, Dr. Warren stated that based on his March 2, 2005, notes, the Claimant was at maximum medical improvement and had a disability rating that corresponded "with a 19% foot impairment which corresponds to a 13% lower extremity impairment." An AFO was prescribed to assist in walking. Dr. Warren referred the Claimant to Dr. L. Barr, M.D., for pain management of an anticipated chronic pain issue. On May 18, 2005, Dr. Warren recommended continued use of the AFO to brace the right ankle and ordered another MRI after complaints of pain and diagnosed tendonitis. The MRI indicated the prior fracture was completely healed and there was no swelling, edema, complete rupture, or dislocation. After review of the MRI, Dr. Warren agreed to replace the AFO with custom shoes. On August 3, 2005, the Claimant reported that the AFO was not working, he was not using the AFO, and he was using his air cast and crutches to take stress of his ankle.

X-ray Reports from Bon Secours / DePaul Medical Center (EX 10 and 11)

EX 10 and 11 are x-ray reports of the right foot. Both were performed on May 8, 2004. The x-rays were as reported and utilized in EX 9.

MRI Reports from MRI & CT Diagnostics (EX 12 and 13)

EX 12 and 13 are MRI reports of the right ankle. Both were performed on July 17, 2004. The MRI reports were reported and utilized in EX 9.

Right Ankle Surgical Reports of October 5, 2004 (EX 14)

EX 14 contains reports of the right ankle surgery performed by Dr. Warren as discussed in EX 9.

Physical Therapy Evaluation of February 15, 2005 (EX 15)

EX 15 is a report of evaluation by physical therapist S.F. Schall, which was performed on February 15, 2005. This report was discussed by Dr. Warren in his notes in EX 9.

Functional Capacity Evaluation Report of February 17, 2005. (EX 16)

Exhibit EX 16 is a report of the functional capacity evaluation completed by physical therapist M. Loumeau on February 17, 2005. Mr. Loumeau reported "[o]verall test findings, in combination with clinical observations, suggest the presence of sub-maximal effort . . . simply stated [Claimant] can do more physically at times than what was demonstrated during this testing day. . . . Overall test findings, in combination with clinical observations, suggest considerable question be drawn as to the reliability/accuracy of [Claimant's] subjective reports of pain/limitation. . . . Significantly more weight should be placed upon objective findings verses

subjective reports." Mr. Loumeau reported that the Claimant "demonstrated less than full physical effort and a significant degree of symptom magnification; therefore I am unable to provide an accurate estimate of his maximal physical abilities and reasonable limitations at this point. [He] demonstrated the ability to perform some work at the Sedentary Physical Demand Level."

Labor Market Survey Report of March 28, 2005 (EX 17)

EX 17 is a Labor Market Report submitted by vocational case manager A. Bouchard on March 28, 2005. Ms. Bouchard reported that according to her file review the Claimant was assigned permanent work restrictions by Dr. P. Warren on March 2, 2005, which limited the Claimant to "a sedentary job only" due to treatment of his May 8, 2004, right foot injury, status-post October 5, 2004, surgery. She had no information about the Claimant's educational background and summarized the Claimant's work as a longshoreman. Ms. Bouchard reported that between March 22 and March 28, 2005, ten positions for entry-level employment were identified that a person with Claimant's work history and current physical limitations could perform. Hourly wages spanned $5.15 to $12.00 per hour. The average salary was $6.55 per hour which was $218.77 per week.

Regular Duty Job Analysis Job Summaries (EX 18)

EX 18 contains the Job Analysis Summary sheets for seven of the ten jobs listed in Ex 17. The report sheets indicate that Dr. P. Warren had reviewed the sheets on April 4, 2005, and had approved the following jobs for the Claimant: desk clerk at Budget Rent-A-Car, unarmed security guard for car lots, donation center attendant for Goodwill Industries of Hampton Roads, parking cashier for Central Parking Systems, order taker at Conforma Labs, and cashier for Crown Petroleum at two locations.

Right Ankle MRI Report of May 19, 2005 (EX 19)

EX 19 contains the report of the Claimant's right ankle MRI of May 19, 2005, as evaluated in EX 9.

May 31, 2005, Consultation Report of Dr. L.B. Barr, M.D. (EX 20)

On May 31, 2005, Dr. L.B. Barr, M.D., evaluated the Claimant upon referral from Dr. P. Warren. The Claimant presented with complaints of chronic right-sided foot and hip pain and low back pain. The Claimant reported pain intensity varies with activity, increases on weight bearing, and is somewhat relieved with rest and medication. Dr. Barr reviewed the Claimant's medical history, work history, and detailed review of systems form completed by the Claimant. Examination reported obesity at 6'2" and 320 pounds; comfortable sitting; intact peripheral pulses; symmetric swelling of both ankles; normal coordination, balance and movement; slightly antalgic gait; localize tenderness in the right ankle; subtle limits on right ankle range of motion; no significant muscle atrophy in the lower extremities; and diminished longitudinal arches. Dr. Barr recommended a consistent program of aquatic exercise and diet to reduce weight and improve functional tolerances. She recommended prolotherapy injections targeting the painful

sinus tarsi and stopping opioid analgesics. She summarized that "this is a complicated situation of an obese deconditioned patient who seems to lack necessary motivation to recover from what appears to be residual sinus tarsalgia. . . . It does not appear that the patient needs further imaging studies, further therapy, or surgery."

Medical Records of Dr. A. Quidgley-Nevares, M.D. (EX 21)

On September 1, 2005, Dr. A. Quidgley-Nevares, M.D., evaluated the Claimant upon referral from Dr. P. Warren. The Claimant presented with complaints of right ankle and foot pain, right knee pain, left foot pain and low back pain time four months. Examination revealed morbidly obese male in no acute distress; antalgic gait on crutches; trace lower extremity pulses; ankle tenderness; decreased ankle range of motion; positive lumbar posterior loading bilaterally. Dr. Quidgley-Nevares assessed chronic pain syndrome secondary to the right ankle injury and course of treatment, as well as gait, mood, and sleep disorder secondary to the chronic pain, obesity pending rehabilitation, and mood disorder affecting rehabilitation. Dr. Quidgley-Nevares set a plan of care to include a bone scan, Percocet, Lidoderm patches, Effexor, Lunesta, aquatic therapy with progression to land therapy and home exercises, and continuation of the crutches with progression to straight cane. The September 8, 2005, bone scan of the feet was reported as normal.

The Claimant attended seven sessions with his physical therapist between September 7, 2005, and September 26, 2005. Visit 6 on September 23, 2005, reports that the Claimant ambulated without an antalgic gait while carrying his crutches and complaining of a sore right ankle. He would perform his exercises properly but stop when the therapist walked away. The therapist reported the Claimant was "not very cooperative" and "is witnessed to ambulate without difficulty [and] up and down stairs without difficulty." It was reported that the Claimant would "put up a fight (verbally) with the therapist touching his ankle [and] kept resisting passive range of motion." The September 26, 2005, physical therapist notes indicate that "patient better today with performing all reps asked of exercises. Patient ambulated into clinic today with both crutches under left upper extremity. Patient ambulated with normal gait pattern. Patient able to ascend and descend stairs in a normal pattern." On September 29, 2005, the physical therapist requested Dr. Quidgley-Nevares advise if the remaining five visits should be completed since the Claimant is "with significant pain behavior . . . has not been very compliant or cooperative with physical therapy . . . [is] very guarded to right foot with any palpation . . . does not seem to be making progress with aquatic physical therapy . . . [and is] not very motivated and displays a negative attitude."

On September 30, 2005, Dr. Quidgley-Nevares examined the Claimant in follow-up. Examination indicated no apparent distress, no sign of narcotism, 340 pound weight, right antalgic gait, decreased 4/5 strength in the distal lower extremities, 1+ right ankle edema, tight bilateral hamstrings, positive bilateral straight leg raising test, and decreased lumbar range of motion in all planes. The impression was chronic pain syndrome with gait disorder and acute lumbar strain, rule-out radiculitis. Aquatic physical therapy was stopped "secondary to increased pain and question of decreased participation by the patient."

Physical Therapy Evaluation of September 7, 2005 (EX 22)

On September 30, 2005, Dr. Quidgley-Nevares performed an evaluation for aquatic therapy. The Claimant reported pain throughout the right foot since the injury and had swelling on the lateral aspect of the foot. He reported that pain was aggravated by walking and he had used his crutches and air splint since the injury. Objective report included limited right ankle range of motion, swelling laterally, hypersensitivity to touch on the right foot, and ambulation antalgic gait on crutches. Decreased strength and range of motion in the right foot limited the ability to ambulate without an assistive device. Physical therapy for strengthening and range of motion of the foot in a decreased weight-bearing environment was ordered at two to three times per week for four to six weeks with progression to land therapy as tolerated.

Work Restrictions and Job Descriptions signed by Dr. Quidgley-Nevares (EX 23)

On November 30, 2005, Dr. Quidgley-Nevares assigned work restrictions to the Claimant as follows: no walking; stand less than 30 minutes; no climbing, balancing, bending, kneeling, crouching, crawling, squatting, pushing, pulling, or overhead reaching; no lifting or carrying 10 pounds at the waist or 5 pounds overhead. On November 30, 2005, Dr. Quidgley-Nevares approved the job descriptions for donation center attendant at Goodwill Industries, cashier at Crown Petroleum (two positions), unarmed security guard on car lots, van driver, desk clerk for Budget Lodge, parking cashier for Central Parking Systems, order taker for Conforma Labs, and driver for Enterprise Rent-a-Car. He disapproved the driver position with Budget Rent-a-Car due to the requirement of constantly getting into and out of cars.

Impairment Classification by Dr. A. Quidgley-Nevares (EX 24)

On December 1, 2005, Dr. Quidgley-Nevares reviewed the impairment rating assigned by Dr. P. Warren and reported that he "believe[d] that the 19% permanent partial disability to the right foot per the AMA Guideline, fifth edition, are appropriate" for the Claimant. He also reported that he reviewed the December 17, 2004, functional capacity evaluation and several sedentary job descriptions.

Vocational Case Manager Letter to Claimant Dated December 21, 2005 (EX 25)

By letter dated December 21, 2005, Ms. A. Bouchard notified the Claimant of the availability of eight available jobs and requested the Claimant to promptly apply for those available positions.

Letter Request for Clarification of Work Restrictions (EX 25)

EX 25 is a copy of a December 21, 2005 letter from Ms. A. Bouchard to Dr. Quidgley-Nevares requesting Dr. Quidgley-Nevares to clarify whether the Claimant could no minimal walking and whether the lifting restriction would permit some lifting less than 10 pounds. The exhibit also contained copies of the documents in EX 23.

Documents from Dr. A. Quidgley-Nevares, M.D. (EX 26)

On January 27, 2006, Dr. Quidgley-Nevares met with the Claimant about his right foot pain. The Claimant reported pain and numbness in both lower extremities, low back pain since starting physical therapy, burning foot pain, and worsened sleep and mood. Examination revealed no apparent distress, no signs of narcotism, 336 pound weight, negative Hoffman's signs in the upper extremities, 4/5 strength in the lower right extremity, no sensory deficits, right foot tenderness, and right foot mild edema. The impression remained chronic pain disorder with gait disorder, low back pain rule-out radiculitis, mood disorder, and sleep disorder. The Claimant was given his requested referral to a rheumatologist and a lumbar x-ray was ordered. Dr. Quidgley-Nevares opined that the Claimant "can return to work on a sedentary manner" and needs "to switch to using a cane instead of crutches as this is disturbing his gait pattern at this time."

On February 2, 2006, Dr. Quidgley-Nevares approved the job description statements for cashier at Crown Petroleum, front desk clerk at Days Inn, sales associate for Something Different Aqua Massage, and sales associate for Global Cellular (four locations).

Letter to Claimant from Vocational Case Manager Dated February 23, 2006 (EX 27)

EX 27 is a letter from Mr. C. Arehart dated February 23, 2006, in which he requests that the Claimant does not present to meetings with potential employers while using crutches.

Curriculum Vitae of Mr. C. Arehart (EX 28)

EX 28 sets forth the professional qualifications of Mr. C. Arehart as a vocational rehabilitation specialist for thirty years. It is consistent with Mr. Arehart's testimony at the hearing.

Eastern Virginia Medical School Facsimile of March 6, 2006 (EX 29)

By written letter dated February 27, 2006, medical case manager I.M. Harwell, RN, requested Dr. A. Quidgley-Nevares clarify whether the Claimant required crutches or a cane to ambulate and whether a job description for order taker at Domino's Pizza would be appropriate for the Claimant. By facsimile transmission on March 3, 2006, check marks were entered on the February 27, 2006, letter indicating that the Claimant did not require crutches for ambulation but did require a cane for ambulation. An attached job description for order taker at Domino's Pizza contained the March 6, 2006, signature of Dr. Quidgley-Nevares indicating the order taker job was appropriate for the Claimant.

No Exhibit EX 30 was submitted.

March 13, 2006, Vocational Case Manger Letter to Claimant (EX 31)

EX 31 is a March 13, 2006, letter addressed to the Claimant in which Mr. C. Arehart advised the Claimant he had arranged for a job interview at Domino's Pizza on March 15, 2006, at 4:30 PM. Mr. Arehart stated that he would provide transportation if the Claimant called him before noon

on March 15, 2006, and said he needed a ride. Mr. Arehart also advised the Claimant that "it would not be appropriate" to volunteer information about several felony convictions dating back to the 1970s.

March 15, 2006, Report of Domino's Pizza Manager (EX 32)

Exhibit 32 is a letter report from the manager of Domino's Pizza stating that the Claimant had called her on March 14, 2006, and inquired about the duties of an order taker. She reported that the Claimant continuously interrupted her and stated he could not perform the order taker job using a touch screen computer. The manager reported the Claimant "left the definite impression that he did not want to try and learn the job duties or attempt to perform them. It was clear to me that [Claimant] did not want the job, so I told him not to come in for the job interview."

Curriculum Vitae of Dr. P. Warren, M.D. (EX 33)

EX 33 indicates that Dr. P. Warren, M.D. is a graduate of Harvard Medical School, performed his internship and residency in orthopedics, is a Fellow of the American Board of Orthopedic Surgery, and has been in group practice in orthopedic medicine or orthopedic surgery fellowship since August 1996.

Reported Earnings to the Social Security Administration (EX 34)

EX 34 indicates that the Claimant earned the following amounts in 2003 and 2004:

2003	P&O Ports of Virginia	$ 5,754.05	
	Virginia International Terminals	6,095.50	
	Universal Maritime Service Corp	22,529.21	
	Hampton Roads Shipping Association ILA Container Royalty Fund	8,107.14	
	Hampton Roads Shipping Association ILA Vacation & Holiday Fund	4,736.40	
	Cooper-T Smith Stevedoring Co., Inc	4,864.40	
	HRSA-ILA Welfare Fund	15.00	
	CERES Marine Terminals, Inc	10,412.49	
		$ 62,514.19	Reported Earnings Total
2004	P&O Ports of Virginia	$ 2,861.65	
	Virginia International Terminals	561.00	
	Universal Maritime Service Corp	6,989.50	
	Hampton Roads Shipping Association ILA Container Royalty Fund	7,946.53	
	Hampton Roads Shipping Association ILA Vacation & Holiday Fund	6,413.36	
	Cooper-T Smith Stevedoring Co., Inc	3,233.95	
	HRSA-ILA Welfare Fund	60.00	
	CERES Marine Terminals, Inc	1,725.45	

$ 29,791.44 Reported Earnings Total

Report of Psychiatric Medical Examination of March 31, 2006 (EX 35)

By facsimile report of April 7, 2006, Dr. P. Mansheim, M.D., reported that he examined the Claimant on March 31, 2006, through review of medical records and a one-hour interview of the Claimant. Dr. Mansheim reported the Claimant appeared at his office two days before his appointment and indicated that a local television station representative would appear at the March 31st appointment and questioned whether that office "would want to be involved in a situation so controversial as to generate that level of interest on the part of a television station." The Claimant was directed to report for the scheduled appointment. At the appointment the Claimant was informed that he would be evaluated "as to whether or not [Claimant] had a psychiatric disorder which has occurred as a result of a work-related condition." The Claimant reported he could not work because of a foot problem, stress, depression, and difficulty dealing with medication. He reported finishing the sixth or seventh grade and having trouble with the law more than 20 years ago. He reported he uses an air cast and uses crutches because he cannot put weight on his leg. The Claimant reported "he believes that he would be able to get back to work if he could get his mental problems treated and if he could 'get myself straightened out.'"

Dr. Mansheim reported the Claimant has a history of symptom magnification and a history of putting forth less effort that doctors thought he could do. He reported that the Claimant was extremely vague in responding to questions. Dr. Mansheim considered the prior appearance and indication of a television crew as a lie and an effort to engage in intimidating behavior. Dr. Mansheim opined that the Claimant presented with a personality disorder and elements of antisocial personality disorder. He indicated that there were no clear indications for depression, anxiety, or other psychiatric disorders beyond personality disorder, not otherwise specified, with antisocial features, and there was no clear indication of a mood disorder. Dr. Mansheim opined that the Claimant did not have a work-related psychiatric or psychological condition and did not require work restrictions for a psychiatric or psychological condition that was work-related.

April 24, 2006, Report of Medical Evaluation by Dr. M.A. Ross (EX 36)

On April 24, 2006, the Claimant appeared, pursuant to court order, for a medical evaluation by Dr. M.A. Ross, M.D. The medical case manager, I. Harwell, RN, was also present. Dr. Ross reported that the Claimant referred to various adverse physician events perceived by Dr. Ross to be "veiled and not-so-veiled intimidation." The Claimant labeled the report by Dr. L. Barr as false and that "she told lies at the request of the insurance company and then 'bailed out' rather than get in trouble." The Claimant reported that "there is something still wrong inside his foot . . . [and] that he has a psychiatric problem for which he needs treatment."

The Claimant reported pain primarily in the right foot and lower back with some pain in the left foot. He reported he wears an air cast and uses crutches all the time for ambulation, but could probably take a few steps without crutches, although he chooses not to do so. He reported pain prevents sleeping and the right foot swells after 15 minutes of a shower. He reported poor balance, occasional lightheadedness, shortness of breath with exertion, generalized weakness, and chronic fatigue. He stated that he drives an automatic transmission vehicle, has a sixth grade

education, rarely goes out of the house, and spends the typical day walking around the house and watching television.

On examination the Claimant was wearing orthopedic shoes with Velcro fasteners and used bilateral auxiliary crutches in a manner that "appeared to be more out of habit than necessity." Weight was 336 pounds. He was alert, oriented, and without cognitive impairment. There was no visual asymmetry to the feet. Speech was clear. There was no back spasm and the back was non-tender except for a far right lateral area beyond the paraspinals. Grip strength was 30 pounds. There was functional range of motion in the right ankle. Sensitivity testing of the right ankle was inconsistent.

After reviewing the medical reports available, Dr. Ross opined that no further medical care or diagnostic evaluation was necessary for treatment of the May 8, 2004, work-related right foot injury; that current treatment was directed exclusively by subjective complaints; that there was insufficient and contradictory objective data to support current medication and perceived disability; that there is a profound disparity between subjective complaints and objective findings; that there is no medical basis for any specific work restrictions; and that the restrictions placed by Dr. Quidgley-Nevares appear to be based on Claimant's subjective complaints and are unreliable.

Approved Job Description for Cashier (EX 37)

On April 14, 2006, Dr. Quidgley-Nevares indicated medical approval for Claimant to perform the job as cashier for Texaco/Amoco gas station in Norfolk, Virginia, described in EX 37 as sedentary level work.

Review of EX 36 by Dr. Quidgley-Nevares, M.D. (EX 38)

EX 38 is a cover letter with EX 36 attached. The letter asks Dr. Quidgley-Nevares two questions about Dr. Ross's opinion as set forth in EX 36. By his initials, Dr. Quidgley-Nevares indicated that it is reasonable to find that (1) the Claimant needs no further medical care for his 5/8/04 injury; and (2) the Claimant needs no work restrictions due to his 5/8/04 injury.

May 22, 2006, Letter of Dr. A. Quidgley-Nevares, M.D. (EX 39)

In a May 22, 2006, letter, Dr. Quidgley-Nevares reported that he agreed with Dr. Ross's April 24, 2006, assessment of the Claimant. He also stated he reviewed Dr. Mansheim's psychiatric evaluation of March 31, 2006, and believed that no further psychiatric evaluation was needed. Dr. Quidgley-Nevares reported the Claimant refused a scheduled May 6, 2006, right lower extremity peripheral nerve block and has declined or refused all of the several treatment options that could be pursued for chronic pain syndrome. On May 6, 2006, the Claimant was discharged from Dr. Quidgley-Nevares's practice.

Approved Job Description for Light Duty Painter/Power Washer (EX 40)

On June 5, 2006, Dr. M. Ross, M.D., indicated medical approval for the Claimant to perform the job as Light Duty Painter/Power Washer for CERES Terminals, Inc. as described in EX 40.

Curriculum Vitae of Dr. P.A. Mansheim, M.D. (EX 41)

Dr. Mansheim is a graduate of the University of Wisconsin Medical School with work in the field of psychiatry since 1970. He is certified by the American Board of Psychiatry and Neurology in psychiatry, forensic psychiatry, addiction psychiatry, and child psychiatry. He is an examiner with the American Board of Psychiatry and Neurology for general psychiatry and child psychiatry. He is currently an Associate Professor in the Department of Psychiatry and Behavioral Sciences at Eastern Virginia Medical School and a visiting Professor at the Naval Regional Medical Center in Portsmouth, Virginia.

Curriculum Vitae of Dr. M.A. Ross, M.D. (EX 42)

Dr. Ross is a graduate of the University of Connecticut School of Medicine with work in the field of physical medicine and rehabilitation since 1984. He is board certified in physical medicine and rehabilitation, electrodiagnostic medicine, and independent medical examiners. He has been the Medical Director for the Riverside Rehabilitation Institute since 1990.

Letters to Claimant from Mr. C. Arehart (EX 43)

EX 43 contains several letters from vocational case manager C. Arehart to the Claimant. The letters concern submitting job applications for various jobs indicated as available for the Claimant. The last June 2, 2006, letter indicates Mr. Arehart advised the Claimant "[a]s stated in my letter of May 26, it is senseless to continue to meet with you if you continue to refuse to complete any job applications. However, if you decide to change your mind and agree to cooperate by completing the job applications in the future, then please write me a letter to that effect."

March 29, 2006, Written Statement of Claimant (EX 44)

EX 44 is an unsigned five page letter by the Claimant "To Whom It May Concern." In the letter the Claimant covers much the same information that he presented in testimony. He generally states an investigation is needed into the way he was treated by the insurance company, the doctors, and the vocational case manager. He states he "suffered a great deal of pain because of the injury and I still can't use my foot to any degree and I am still limited in my movement. I just can't seem to function the way I really need to or like they are saying I can. I am being forced to go to work at this point. . . . They have stopped paying me worker's compensation because of the simple fact that the doctors have gotten together and are saying that I can do this or I can do that. When in reality I can't because my injury is still very, very serious. . . . I am not able to function to the level or even being responsible for taking on a job right now with my condition because I am very limited in my movement and I am suffering with a lot of pain and I am experiencing a lot of mood swings . . . and I need psychiatric treatment right now . . . I am

still not being properly medically treated right now . . . I still yet haven't had the right to my own doctor, someone who is not affiliated at all with the insurance company that can honestly help me and treat me for my condition."

June 21, 2006, Letter from Claimant (EX 45)

EX 45 is a short letter to the Virginia Workers' Compensation Commission wherein the Claimant requests that the District Director be removed from his case because the Director had ordered a medical examination and not medical treatment.

Approved Job Description for Light Duty Painter/Power Washer (EX 46)

On May 31, 2006, Dr. A. Quidgley-Nevares, M.D., indicated medical approval for Claimant to perform the job of Light Duty Painter/Power Washer for CERES Terminals, Inc. as described in EX 46.

Written Offer of Work Position (EX 47)

EX 47 is a copy of the letter sent to the Claimant by certified mail on August 21, 2006, and received on August 23, 2006. The letter advised the Claimant that the light duty painter/power washer job with CERES Marine Terminals was "still available to you, you need only report to Bill Power [telephone number] to work." The letter also notes that interrogatories for use in an October 19, 2006, state workers' compensation hearing were included with the letter.

Written Offer of Work Position (EX 48)

EX 48 is a copy of the letter sent to the Claimant by certified mail on August 30, 2006. The letter advised the Claimant that the light duty painter/power washer job with CERES Marine Terminals approved by Dr. Quidgley-Nevares was "still available to you, you need only report to Bill Power [telephone number] to work. . . . the job pays $15.00 per hour and is available 40 hours a week."

Claimant's August 27, 2006, Answer to Interrogatories (EX 49)

In EX 49, the Claimant responds to general interrogatories about past medical injuries and treatment, identifies treating physicians and time frames, states he has a seventh grade education and reads and writes on the sixth grade level, and covers employment efforts as explained during his testimony at the hearing.

Vocational Case Manager Report of September 11, 2006 (EX 50)

EX 50 is a September 11, 2006, written case summary from vocational case manager, Mr. C. Arehart. The report summarizes his follow-up of the Claimant's representation of contacting various prospective employers when he looked for jobs. EX 50 is consistent with the testimony of Mr. Arehart at the hearing.

Dr. M. Ross Addendum to April 24, 2006, Medical Evaluation (EX 51)

On September 18, 2006, Dr. M. Ross, M.D., reviewed his report of April 24, 2006 (EX 36), additional medical records from Sentara Leigh Hospital emergency room dated March 10, 2006 (CX 5), May 21, 2006 (CX 4), and July 18, 2006 (CX 3), as well as the bone scan of July 24, 2006 (CX 7), and a right ankle MRI from Sentara Norfolk General Hospital (not further identified).

Dr. Ross stated that, after review of the documents, that the Claimant's complaints had not changed, none of the emergency department evaluations yielded any diagnostic results different from what was already known, and that the opinions he expressed in his April 24, 2006, report were unchanged.

Medical Records from Virginia Commonwealth University Medical Center (EX 52)

The first three pages of EX 52 are the same as CX 8 summarized above. EX 52, page 6 is the electronically signed version of CX 7. EX 52, pages 7 and 8 are the same as CX 7 summarized above.

EX 52, pages 4 and 5, is the medical report from Dr. S.J. Mest, D.P.M. for a visit by the Claimant on July 17, 2006, following referral by Dr. Mullinax for right foot pain. The Claimant reported his medications as Percocet, Effexor, Lyrica and Lidoderm patch. Dr. Mest reported that a review of the July 17, 2006, x-rays indicated some degenerative changes and that a bone scan would be appropriate. He reported observing some edema and that the Claimant was grossly overweight. Dr. Mest noted that he refused to write any prescriptions for narcotics and that the Claimant's foot and ankle were not severe enough that he required narcotic management.

EX 52, page 9, is the August 2, 2006, report from Dr. Mest. Dr. Mest reported that the Claimant constantly complained of pain nowhere near the sites of anything on the bone scan. Dr. Mest reported that the Claimant had arthritic changes in the right foot by bone scan and x-rays. He stated that there was nothing he could do for the Claimant's right foot and recommended weight weight.

Job Description for Light Duty Painter/Power Washer (EX 53)

EX 53 is an unsigned job description for the position Light Duty Painter/Power Washer for CERES Terminals, Inc. as described in EX 46.

Copy of Subpoena for Medical Records of Dr. S.J. Mest, M.D. (EX 54)

EX 54 is a copy of the subpoena for medical records indicating that Dr. Mest received the subpoena on September 11, 2006.

DISCUSSION

To be entitled to compensation for an injury, a claimant bears the initial burden of establishing a prima facie case that he suffered an injury arising out of and in the course of employment. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP (Riley)*, 455 U.S. 608 (1982). He is not required to introduce affirmative evidence that his working conditions in fact caused his injury; however, he must at least show that working conditions existed which could have caused the harm. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326, 330-31 (1981). Under § 20 of the Act, once the claimant has established a prima facie case, in the absence of substantial evidence to the contrary, he is entitled to the presumptions that the claim presented comes within the provisions of the Act and that sufficient notice of the claim has been given. 33 U.S.C. § 920(a)-(b) (2000). After entitlement to these presumptions is established, the employer has the burden to demonstrate with substantial countervailing evidence that the injury was not caused by the claimant's employment. *Swinton v. J. Frank Kelly, Inc*., 554 F.2d 1075 (D.C. Cir. 1976), *cert denied* 429 U.S. 820 (1976).

Here the Claimant has established, by stipulation, that he suffered physical injury (right foot/ankle fracture) and resulting pain on May 8, 2004, and that conditions existed at work on May 8, 2004, that could have caused the right foot injury and related pain. The parties have also stipulated that the injury arose out of and in the course of the Claimant's employment while working as a longshoreman loading and unloading a ship and is within the provisions of the Act. Therefore, the Claimant is entitled to the presumptions contained in 33 U.S.C. § 920.

I. THE CLAIMANT WAS TEMPORARILY DISABLED FROM THE DATE OF INJURY UNTIL MARCH 14, 2005, AND PERMANENTLY DISABLED THEREAFTER.

A disability is classified at any given time as either temporary or permanent in nature. *See* 33 U.S.C. § 908. There are two tests for determining the nature of a disability. *Eckley v. Fibrex and Shipping Inc.*, 21 BRBS 120, 122 (1988). First, an employee is permanently disabled if he reaches maximum medical improvement and still has some residual disability. *Id.*; *James v. Pate Stevedoring Co*., 22 BRBS 271 (1989). Second, even if maximum medical improvement has not yet been reached, "an employee [is] permanently disabled when his condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP (Chappell)*, 592 F.2d 762, 764, 10 BRBS 81, 83 (4th Cir. 1979) (quoting *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968)). If neither of these tests is met, the claimant is temporarily disabled, rather than permanently disabled. The point at which a claimant's condition changes from temporary to permanent disability is based on the medical evidence, in particular the claimant's date of maximum medical improvement, not economic factors. *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 61 (1985).

The Claimant's right foot was injured on May 8, 2004. (EX 2.) The medical evidence of record establishes that the Claimant was treated extensively for that injury and Dr. Warren, the physician who performed the Claimant's foot surgery, determined he had reached maximum

medical improvement on March 14, 2005, with a 19% permanent partial disability rating. (EX 9.) Accordingly, on that date, the Claimant's physical disability ceased being temporary and became permanent in nature.

II. THE CLAIMANT WAS TOTALLY DISABLED FROM THE DATE OF INJURY UNTIL APRIL 4, 2005, WHEN HE BECAME PARTIALLY DISABLED.

The Act defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2000). Generally, the claimant must have an economic loss and a physical or psychological impairment to receive compensation. *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991). However, if the claimant sustains a permanent partial disability to a body part listed in the schedule, he is entitled to compensation "regardless of whether his earning capacity has actually been impaired." *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363, 363 (1980) [hereinafter *PEPCO*].

When the claimant has a permanent partial disability to a body part listed in the schedule, he is entitled to compensation equal to two-thirds of his average weekly wage for a specified number of weeks. 33 U.S.C. § 908(c)(1)-(20) (2000). Unless the claimant can prove he is totally disabled, he is not entitled to any more compensation than that awarded by the schedule. *PEPCO*, 14 BRBS at 363; *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196, 199 (1984).

A. Total Disability

To be awarded total disability benefits, a claimant must first demonstrate his inability to return to his former job because of his work-related injury. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 380 (4th Cir. 1994). To determine whether the claimant can return to his former job, the Administrative Law Judge ("ALJ") should compare the claimant's work restrictions with the requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988). A claimant's usual employment is the regular duties he was performing at the time of his injury. *See Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). In this case, the Claimant's usual employment is longshoreman/gangwayman. The Claimant alleges that he cannot return to his usual employment because of his work-related right foot and ankle injury; however, there is significant evidence to show that the Claimant can return to his usual employment presently.

1. Right Foot/Ankle Injury - May 9, 2004, through May 22, 2006

The Claimant has established that he was unable to return to his prior employment as a longshoreman/gangwayman because of his work-related right foot and ankle injury between May 9, 2004, and May 22, 2006. Dr. Cohn, the Claimant's chosen physician, kept him out of work from his first visit on May 11, 2004, until August 3, 2004, when he opined that the Claimant could perform sedentary work, if available. Since Dr. Cohn restricted the Claimant to sedentary work, he was unable to return to his employment as a longshoreman/gangwayman at that time.

Dr. Warren kept the Claimant out of work from June 18, 2004, until February 28, 2005, approximately five months after the Claimant's foot surgery. On that date, he met with the Claimant and reviewed the results of the February 17, 2005, Functional Capacity Evaluation ("FCE"), which limited the Claimant to sedentary work. (EX 9, 16.) In the FCE report, the therapist also compared the Claimant's prior job description to his limitations and determined that he could not perform his prior job because of standing, stair/ladder climbing, and lifting limitations. (EX 16.) Dr. Warren agreed with the therapist's findings. (EX 9.) Thus, on February 28, 2005, when Dr. Warren released the Claimant to sedentary work, he was still unable to return to his usual employment as a longshoreman/gangwayman.

On November 30, 2005, Dr. Quidgley-Nevares also stated that the Claimant was limited to sedentary work. (EX 23, 24.) He gave the Claimant the following work restrictions: no climbing stairs/ladders; standing less than 30 minutes; no walking; and no climbing, balancing, stooping, bending, kneeling, crouching, crawling, squatting, pushing, pulling, or reaching above the shoulder. (EX 23.) He noted that the Claimant should never lift or carry from floor to waist or waist to overhead, but he also noted a ten and five pound weight limit, respectively. (EX 23.) Therefore, the Claimant was unable to return to his usual employment as a longshoreman/gangwayman.

2. Right Foot/Ankle Injury – May 22, 2006, and Continuing

On April 26, 2006, Dr. Ross performed an independent medical examination and opined that there was "no medical basis for any specific work restrictions." (EX 36.) He further opined that Dr. Quidgley's work limitations appeared to be "based on [the Claimant's] subjective feedback regarding his symptoms which, after today's evaluation, I consider to be unreliable." (EX 36.) Dr. Ross also observed that there was "a profound disparity between subjective complaints and objective findings" and "considerable inconsistency" during the Claimant's physical examination. (EX 36.) For example, the Claimant described a burning, throbbing, sometimes stabbing pain in his right foot that was constant. (EX 36.) He also stated that on a scale from 0 to 10, where 10 is the worst pain imaginable, his average pain was 8, but it was 10 on the day of the exam. (EX 36.) However, Dr. Ross observed the Claimant put all his weight on his right foot in the waiting room which "did not result in any facial grimace or any other indication of discomfort." (EX 36.) Additionally, during Dr. Ross's physical examination, the Claimant at times could feel the slightest touch of a paper clip on his foot, but then would claim his foot was numb and he could feel nothing. (EX 36.) He would also tolerate Dr. Ross's palpation of his foot, but then "the slightest touch caused him to back away." (EX 36.)

Upon review of Dr. Ross's report on May 22, 2006, Dr. Quidgley agreed with Dr. Ross's assessment. (EX 38, 39.) Considerable weight is accorded to Dr. Ross's opinion, as it is based on a thorough examination and record review. The Claimant's treating physician's agreement with Dr. Ross's opinion further lends it credibility. Accordingly, since the Claimant has no work restrictions as of May 22, 2006, he is currently able to return to his usual employment.[3]

[3] No weight is given to the opinion of Dr. Lorestani in CX 6, since it is unsupported by any referenced medical examination.

3. Left Foot, Right Knee, and Low Back Injury

The Claimant is also alleging that he has right knee, left foot, and low back pain, which is causally related to his right foot/ankle work-related injury. (EX 5.) The only evidence in the record of these injuries is the Claimant's subjective complaints. (EX 21, 26.) No physician has treated him for these alleged injuries nor has any physician assigned any work restrictions because of his complaints. Dr. Mullinax performed some laboratory work to rule out inflammatory rheumatic disease, but he did not suspect that was the case, and he did not relate it to the Claimant's right foot/ankle work injury. (EX 52.) Dr. Quidgley assessed the Claimant's pain as being related to his continuous use of crutches, which was causing gait disorder and low back pain and repeatedly instructed the Claimant to switch to a cane instead of using crutches, which he did not do. (EX 26, 29.) Since the Claimant has presented no evidence that his alleged left foot, right knee, and low back pain has caused him to be unable to return to his usual employment, those alleged injuries are not compensable.

4. Psychological Injury

The Claimant has also alleged that he is suffering from depression and needs treatment for a mental condition which is preventing him from returning to work. However, he has failed to present evidence of a work-related psychiatric or psychological impairment causing him to be unable to return to his former job. The only evidence in the record supporting the Claimant's allegation consists of his subjective complaints made to Drs. Mansheim and Ross, and Dr. Quidgley's assessment of mood disorder. (EX 21, 35, 36.) On the other hand, Dr. Mansheim opined that, while the Claimant showed evidence of antisocial personality disorder, not otherwise specified, he found no "clear indication of depression, anxiety, or any other psychiatric disorder." (EX 35.) He also opined that the Claimant had no work-related psychological or psychiatric condition. (EX 35.) Further, he opined that the Claimant did not need work restrictions for any psychiatric or psychological condition. (EX 35.) Thus, even if the Claimant has a personality disorder, there is no evidence showing that it is a work-related injury, nor is there any evidence that it is preventing him from returning to his prior job. Accordingly, this Administrative Law Judge finds that the Claimant has no compensable psychological disability.

B. Availability of Suitable Alternative Employment

Once the claimant has proven he cannot return to his former position, the burden shifts to the employer to show the availability of suitable alternative employment for the claimant. *Id.*; *Chappell*, 592 F.2d at 765. In identifying suitable alternative employment, the claimant's "age, background, employment history and experience, and intellectual and physical capacities" must be taken into account. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 201 (4th Cir. 1984) (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981)). A single job opening will not satisfy the employer's burden; "an employer must present evidence that a range of jobs exists" that the claimant can perform and realistically secure. *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988). Further, these jobs must be "reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure." *Trans-State Dredging*, 731 F.2d at 201 (quoting *Turner*, 661 F.2d at 1042-43).

For a job opportunity to be realistically available, the precise nature and terms of each job must be established. *Rieche v. Tracor Marine, Inc.*, 16 BRBS 272, 274 (1984). The pay scale for the positions must also be established, so as to show the claimant's earning capacity. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024, 1027 (1978) (quoting *DuPuis v. Teledyne Sewart Seacraft*, 5 BRBS 628, 630 (1977)). However, the employer is not required to contact a prospective employer to see if that employer would hire someone with the claimant's characteristics. *Trans-State Dredging*, 731 F.2d at 201. Additionally, the employer does not have to contact prospective employers for specific job requirements; standard occupational descriptions may be relied upon to determine the necessary qualifications and requirements. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119, 125 (CRT) (4th Cir. 1997).

The employer may rely on the testimony of a vocational rehabilitation expert to satisfy its burden. *Southern v. Farmers Export Co.*, 17 BRBS 64, 66 (1985). However, the ALJ should consider all physical and psychological limitations of record given by treating physicians when evaluating the claimant's ability to perform a specific job identified by the vocational expert. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, 103 (1985). The employer may also meet its burden by offering the claimant a light-duty job in its facility, as long as that job is necessary, profitable, and the claimant is able to perform the job. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986). If the employer carries its burden by offering the claimant a job in its own facility, the employer is not required to show the availability of employment on the open market. *Id.* at 227.

On March 28, 2005, Amy Bouchard, the Claimant's first vocational case manager performed a Labor Market Survey ("LMS") for the Claimant. (EX. 17.) In the LMS, she reported that she reviewed the Claimant's medical information and acknowledged that he was limited to sedentary work. (EX 17.) She also noted the Claimant's work history, but she did not have any information as to his education level. (EX 17.) She identified ten entry-level positions in the Norfolk, Portsmouth, Chesapeake, and Virginia Beach areas. (EX 17.) The positions were: desk clerk at Budget Lodge, unarmed security guard for Atlantic Protective Services, donation center attendant at Goodwill, parking cashier for Central Parking Systems, order taker at Conforma Labs, cashier at two different Crown Petroleum locations, driver for Budget Rent-a-Car and Enterprise Rent-a-Car, and van driver for Child and Family Service of Eastern Virginia. (EX 17.) Six of the positions were forty hours per week, one was thirty-two, another ranged from twenty to forty, one was thirty-eight, and one was up to thirty hours per week. (EX 17.) The wages ranged from $5.15 per hour to $12.00 per hour. (EX 17.) Job analyses were forwarded to Dr. Warren for his approval and on April 4, 2005, he approved all the positions except the two driver positions and the van driver job, the descriptions of which were not included with his other approvals. (EX 18.) It is noted that on November 30, 2005, Dr. Quidgley also approved all of these jobs except the driver for Budget Rent-a-Car. (EX 23.)

On December 21, 2005, counselor Bouchard identified eight more entry level positions in the Virginia Beach, Norfolk, and Chesapeake areas for the Claimant. (EX 24A.) These positions included two cashier jobs, five sales associate jobs, and a front desk clerk job. (EX 24A.) Each job was forty hours per week and the pay ranged from $6.50 per hour to $7.90 per hour. (EX 24A.) Counselor Bouchard requested that the Claimant apply for these positions by December

31. (EX 24A.) The job descriptions were forwarded to Dr. Quidgley for his approval, and on February 2, 2006, he approved all the jobs as within the Claimant's physical abilities. (EX 26.)

Although counselor Bouchard did not know the Claimant's educational level when she performed the LMS, counselor Arehart reviewed the jobs identified and, knowing that the Claimant has a seventh grade education, concluded the jobs were appropriate given the Claimant's age, education, employment history, and work restrictions. (TR at 57-58.) Counselor Arehart testified that the jobs in the LMS were sedentary, provided training, and were entry level, which means that there are minimal educational requirements. (TR at 58.) He also testified that the entry level sedentary jobs identified by counselor Bouchard on December 21, 2005, were appropriate for the Claimant as well. (TR at 59.)

Counselor Arehart took over for counselor Bouchard in February of 2006. (TR at 60.) He identified an entry-level position as an order taker at Domino's Pizza in Norfolk, which was up to forty hours per week and paid $5.15 per hour. (EX 29.) Dr. Quidgley approved that job on March 6, 2006. (EX 29.) Counselor Arehart also identified a job as cashier at Texaco for 32-40 hours per week at $6.00 per hour, which Dr. Quidgley signed off on April 14, 2006. (EX 37, 43.) According to his letters to the Claimant, counselor Arehart also provided job applications and leads for a driver with Budget Rent-a-Car, pizza order taker at Domino's, service station booth cashier at BP, parking cashier, donation attendant, and three cashier positions. (EX 43.)

It is also noted that the Claimant was twice offered a light duty painter/power washer job by the Employer, once on August 21, 2006, and a second time on August 30, 2006. (EX 47, 48.) The job paid $15.00 per hour and was forty hours per week. (EX 47, 48.) Dr. Quidgley signed off on the job on May 31, 2006. (EX 46, 47, 48.) On June 5, 2006, Dr. Ross signed off on that job as well. (EX 40.) Counselor Arehart testified at the hearing that the job description did not appear to be appropriate for the Claimant's work restrictions; however, he also appeared to be unaware that, by the time these jobs were offered, Dr. Quidgley had removed the Claimant's work restrictions and had approved the job as within the Claimant's physical abilities. (TR at 66-67, 74.) Since the Claimant was no longer under any work restrictions per Dr. Quidgley and Dr. Ross at the time the job was offered, the Claimant was able to perform the job requirements.

Between the LMS and other jobs identified by counselors Bouchard and Arehart, the Claimant was supplied with at least twenty-eight entry level sedentary job leads. All of the positions were within the Claimant's physical limitations according to the Claimant's treating physicians, except the driver position that Dr. Quidgley did not approve because of the Claimant's problems getting in and out of vehicles constantly. Additionally, many of the employers stated that they would accommodate all the Claimant's work restrictions. (EX 18.) These jobs were also appropriate for the Claimant's educational level, since they were all entry level jobs, required no special skills, and many provided on-the-job training. (EX 18.) Accordingly, this Administrative Law Judge finds that the Employer established the existence of suitable alternative employment for the Claimant as of April 4, 2005.

Once the employer identifies suitable alternative employment, the Fourth Circuit has held that the claimant has a reciprocal burden to demonstrate a willingness to work and reasonable diligence in attempting to secure one of those jobs. *Trans-State Dredging*, 731 F.2d at 201-02.

This burden necessarily implies that the claimant must reasonably cooperate with his employer's rehabilitation specialist and submit to rehabilitation evaluations. *Vogle v. Sealand Terminal*, 17 BRBS 126, 128-29 (1985); *Villasenor*, 17 BRBS at 102. The Administrative Law Judge must consider any failure to cooperate in evaluating the vocational expert's testimony and the extent of the claimant's disability. *Villasenor*, 17 BRBS at 102.

If the employer has not identified suitable alternative employment or the claimant, despite the employer's showing of suitable alternative employment, has shown a diligent but unsuccessful job search, the claimant is totally disabled. *Trans-State Dredging*, 731 F.2d at 200-02; *See*, 36 F.3d at 380. Conversely, if the employer has identified suitable alternative employment and the claimant cannot show a diligent, unsuccessful search, the claimant will be deemed no more than partially disabled. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (1988).

In this case, the Claimant has done numerous things to undermine his job search. He has been very uncooperative with his vocational case managers throughout the job search process and repeatedly demonstrated an unwillingness to work, even though he could perform at least sedentary jobs. There is significant evidence tending to show that the Claimant put forth "sub-maximal effort" during his FCE and that he could do more physically that what he was demonstrating throughout the evaluation. (EX 16, 20.) During his meetings with counselor Arehart, the Claimant constantly put up barriers to prevent accurate vocational evaluation and rehabilitation. (EX 43, 50.) He gave counselor Arehart information that conflicted with information he gave counselor Bouchard. (EX 31.) He missed appointments with counselor Arehart simply because he was in a "bad mood." (EX 43.) He maintained that he absolutely could not work because of his medical condition, even though he had been released to work by all his physicians. (EX 43, 50, TR at 61.) He refused to apply for any of the jobs identified in the LMS or any other jobs identified by counselors Bouchard and Arehart.[4] (EX 43, TR at 61-62.) He also insisted on using his crutches during job searches and interviews, although he was instructed by both Dr. Quidgley and counselor Arehart not to do so. (EX 26, 27, 51; TR at 45-47.)

Further, the Claimant contacted a potential employer with whom counselor Arehart arranged a job interview and repeatedly told the manager he could not perform the job duties, leaving the impression that he was not willing to try to learn the job. (EX 32.) He also told a potential employer that "I was not able to be reliable and responsible enough to maintain a job." (EX 44; TR at 47.)

The Claimant did attempt to conduct his own job search, which is documented at CX 12. However, he consistently sought out jobs he should have known he was unable to perform due to his work restrictions, although a few of the jobs were appropriate. (CX 12; EX 50, TR at 64.) Moreover, he never submitted applications for any of the jobs. (CX 12; EX 50, TR at 64.) Additionally, he reported that many of the employers he contacted were not hiring, such as the Little Creek Texaco, but when counselor Arehart contacted the same employers, many of them stated they were hiring at the time the Claimant made contact. (EX 50; CX 12.)

[4] Mr. Arehart testified that he completed one application for the Claimant, but no other applications were completed by himself or the Claimant. (TR at 61-62.)

The Claimant also testified that he called the Employer's contact, Mr. Parker, a few weeks after receiving the light duty job offers from the Employer, but Mr. Parker acted like he did not know what the Claimant was talking about. (TR at 48-49.) The Claimant stated that he waited at least two to three weeks after receiving the job offers to contact Mr. Parker because "I was out of work for my medical treatment." (TR at 49-50.) However, he has presented no credible evidence that he was being kept out of work for medical treatment at that time. On the other hand, the Employer has presented a considerable amount of evidence showing that not only was the Claimant released to work, he was released without medical restrictions by both Dr. Ross and Dr. Quidgley by the time the Employer offered him the light duty job.[5]

After review of the record, this Administrative Law Judge finds that the Claimant has not demonstrated a willingness to work or reasonable diligence in attempting to find a job. Accordingly, the Claimant has failed to rebut the Employer's showing of suitable alternative employment.

III. THE CLAIMANT'S BENEFITS UNDER THE ACT

A. The Claimant's Average Weekly Wage

The LS-208 and LS-206 forms filed by the Employer contain different figures for the Claimant's average weekly wage ("AWW"). (EX 1, 4.) The LS-208 shows that the Claimant's AWW was $946.41, whereas the LS-206 shows his AWW as $871.66. (EX 1, 4.) However, both figures are different than the AWW calculated by this Administrative Law Judge using EX 6, the Hampton Roads Maritime Association Work/Pay Printout of the Claimant's pay from May 8, 2003, through May 8, 2004. (EX 6.) The Employer asserts in its post-hearing brief that the AWW contained in the LS-208 is the Claimant's correct AWW, but it is not readily apparent in the record as to exactly how the Employer arrived at that AWW

Pursuant to 33 U.S.C. § 910, there are three ways to determine a claimant's AWW. In all three situations, the claimant's AWW is determined by dividing his average annual earnings by 52. 33 U.S.C. § 910(d). The claimant's average annual earnings under § 10(a) equals "three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed." 33 U.S.C. § 910(a). The average daily wage is the claimant's actual wages for the preceding 52 weeks divided by the number of days he actually worked during that period. The claimant's actual wages includes holiday, vacation, and container royalty payments, as long as they are earned with actual work and not disability credits. *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15, 26 (CRT) (4th Cir. 1998).

Section 10(a) applies when the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a). A claimant works

[5] Again, no weight is given to the opinion of Dr. Lorestani given on September 20, 2006, since it is unsupported by any referenced medical examination.

"substantially the whole of the year" where his work is full time and steady. *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990). Section 10(b) applies when the claimant has not worked substantially the whole of the year preceding his injury. 33 U.S.C. § 910(b). The claimant's average annual earnings are determined based on the earnings of "an employee of the same class working substantially the whole of such immediately preceding year in the same or similar employment in the same or neighboring place shall have earned in such employment during the days when so employed." *Id.* If neither section can "reasonably and fairly be applied," § 10(c) applies. 33 U.S.C. § 910(c). Pursuant to § 10(c), the Claimant's average annual earnings are equal to "such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury . . . shall reasonably represent the annual earning capacity of the injured employee." 33 U.S.C. § 910(c). The objective of § 10(c) "is to arrive at a sum which reasonably represents the claimant's annual earnings at the time of his injury." *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). An ALJ has broad discretion when using § 10(c) to determine the claimant's AWW. *Sproull*, 25 BRBS at 105.

Here, the Claimant worked 183 days[6] as a longshoreman for the Employer and other longshore employers during the 52 weeks[7] preceding his May 8, 2004, work-related injury. (EX 6.) His work records show that in that time, the Claimant worked six one-day weeks, nine two-day weeks, twelve three-day weeks, eleven four-day weeks, nine five-day weeks, two six day weeks, and three seven-day weeks. (EX 6.) He worked an average of 9.3 hours per day[8] and 32.8 hours per week,[9] for an average of 3.53 days per week. Based on this information, he cannot fairly be classified as a five-day or six-day worker. Moreover, if the Claimant were classified as a five-day worker, his average annual earnings would be $80,831.22,[10] a total which results in significant overcompensation, considering his actual wages only totaled $56,892.74.[11] (EX 6.) It is noted that using § 10(a) may result in some overcompensation, but that is acceptable unless the result is excessive or unfair. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148, 151 (CRT) (9th Cir. 1998). In this case, a 42% increase in earnings is clearly excessive and unfair. Therefore, § 10(a) cannot reasonably and fairly be applied to determine the Claimant's AWW.

Section 10(b) does not apply in this case because neither party has presented any evidence as to the average annual earnings of another employee in the same or similar employment. Thus, § 10(c) must be applied to reasonably and fairly determine the Claimant's average weekly wage. There is nothing in the record to show that the holiday, vacation, and container royalty payments the Claimant received in 2003 were not given for actual work performed, so these payments are

[6] Based on a five-day a week worker, the Claimant worked 70.4% of a possible 260 work days.

[7] The 52-week period preceding the Claimant's injury began on Saturday, May 10, 2003, and ended on Friday, May 7, 2004, which therefore excludes the seven hours worked on the day of the Claimant's injury, Saturday, May 8, 2004.

[8] The Claimant worked 1706 hours during the 183 days he worked in the 52-week period preceding his injury, resulting in an average work day of 9.3 hours. (EX 6.)

[9] The Claimant worked 1706 hours in the 52-week period preceding his injury, resulting in a 32.8 hour average work week. (EX 6.)

[10] Determined by dividing the Claimant's actual wages between May 10, 2003, and May 7, 2004, including 2003 holiday, vacation, and container royalty payments, by the number of days he actually worked (183) and then multiplying that result by 260 for a five-day a week worker.

[11] This total represents the Claimant's actual earnings in the 52 weeks prior to his injury, plus holiday, vacation, and container royalty payments made in 2003. (EX 6, 34.)

included in the Claimant's actual wages.[12] The Claimant's actual earnings for the 52-week period prior to his injury totaled $44,049.20, so his average weekly earnings during that period amounted to $847.10. In 2003, he earned holiday and vacation pay of $4,736.40 and container royalty pay of $8,107.14. (EX 34.) Therefore, he earned an average of $91.08 per week in holiday and vacation pay, and an average of $155.91 per week in container royalty pay. These three amounts added together equal $1,094.09. Accordingly, this Administrative Law Judge finds that the Claimant's AWW at the time of his May 8, 2004, work-related injury was $1,094.09.

B. Compensation for the Claimant's Period of Temporary Total Disability

The Claimant was temporarily and totally disabled between May 9, 2004, and the date he reached maximum medical improvement, March 14, 2005. During this time period, he was entitled to two-thirds of his AWW at the time of his injury. 33 U.S.C. § 908(b).

The Employer paid the Claimant temporary total disability benefits at a compensation rate of $630.94 per week from May 9, 2004, through April 4, 2005. However, he was entitled to payment at a compensation rate of $729.39 per week based on his AWW of $1,094.09. Therefore, the Claimant was underpaid in the amount of $98.45 per week during his period of temporary total disability.

C. Compensation for the Claimant's Period of Permanent Total Disability

The Claimant was permanently and totally disabled between the date he reached maximum medical improvement, March 14, 2005, and the date suitable alternative employment was established, April 4, 2005. During this time period, the Claimant was entitled to two-thirds of his AWW at the time of his injury. 33 U.S.C. § 908(a).

Between March 14, 2005, and April 4, 2005, the Employer continued to pay the Claimant temporary total disability benefits at the rate of $630.94 per week, rather than permanent total disability benefits at the rate of $729.39 per week. Therefore, the Claimant was underpaid in the amount of $95.45 per week during his period of permanent total disability.

D. Compensation for the Claimant's Permanent Partial Disability

The Claimant's injury is to his right foot, which is a scheduled body part. *See* 33 U.S.C. § 908(c)(4). For the loss of a foot, a claimant is entitled to 205 weeks of compensation. *Id.* Pursuant to 33 U.S.C. § 908(c)(19), "[c]ompensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member." Thus, the claimant is entitled to receive the full compensation rate of two-thirds of his AWW for a number of weeks proportionate to the loss of use. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569, 17 BRBS 29 (CRT) (5th Cir. 1985).

[12] The 2003 holiday, vacation, and container royalty payments are used to calculate the Claimant's AWW because the 2003 amounts more accurately reflect what the Claimant would earn in one full year of work.

The Claimant failed to establish that he was permanently and totally disabled after April 4, 2005; therefore, he is only entitled to the scheduled award for his permanent partial disability. *See PEPCO*, 14 BRBS at 363. Dr. Warren, the physician who performed the Claimant's foot surgery, assessed a 19% disability rating for the right foot impairment. (EX 9.) After review of Dr. Warren's impairment rating, Dr. Quidgley-Nevares agreed that a 19% disability rating was appropriate. (EX 24.) Therefore, beginning on April 5, 2005, the Claimant was entitled to compensation equal to two-thirds of his AWW as of May 8, 2004, for 19% of the 205 week period, which equals 38.95 weeks. The Employer paid the Claimant at a rate of $630.95 per week for 38.95 weeks, but the Claimant was entitled to $729.39 per week; thus, the Claimant was underpaid by $95.45 per week for 38.95 weeks.

E. The Claimant's Entitlement to Medical Benefits

An employer is responsible for the claimant's reasonable and necessary medical expenses for the treatment of a work-related injury. 33 U.S.C. § 907(a) (2000); *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). This responsibility includes reimbursing the claimant for out-of-pocket medical expenses, as long as the claimant has complied with 33 U.S.C. § 907(d)(1), which states that:

> [a]n employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless-- (A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations; or (B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

33 U.S.C. § 907(d)(1); *Mattox v. Sun Shipbuilding and Dry Dock Co.*, 15 BRBS 162, 171-172 (1982). However, even if the employer refuses to authorize or provide medical care, the claimant is not entitled to reimbursement unless "the treatment he subsequently procures was necessary for treatment of the injury." *Rieche v. Tracor Marine, Inc.*, 16 BRBS 272, 275 (1984). It is the claimant's burden to show medical treatment was necessary. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 114 (1996). The claimant can establish a prima facie case for payment of medical expenses where a physician "indicates treatment was necessary for a work-related condition." *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984).

In this case, the Employer authorized medical care and paid for the Claimant's reasonable and necessary medical expenses until May 17, 2006. (EX 3; CX 11.) At that time, the Employer filed Department of Labor Form LS-207, indicating that it would not pay for any of the Claimant's further medical care based on the reports of Drs. Mansheim and Ross. (CX 11.) A copy of that form was mailed to the Claimant on May 24, 2006, along with copies of the medical reports. (CX 11.)

On March 31, 2006, Dr. Mansheim evaluated the Claimant's psychiatric condition and opined that the Claimant "does not have a psychiatric disorder, which resulted from a work-related condition, for which he requires psychiatric treatment." (EX 35.) Dr. Ross performed an

independent medical evaluation on April 24, 2006, during which he examined the Claimant and reviewed his medical records. (EX 36.) Dr. Ross then opined that "no further medical care or diagnostic evaluations are necessary for the treatment of [the Claimant's] 05/08/2004 work-related injuries." (EX 36.) Dr. Ross later supplemented his report after reviewing additional medical records, and stated that his opinions remained unchanged. (EX 51.)

By letter dated May 22, 2006, Dr. Quidgley-Nevares stated that he had reviewed Dr. Ross's April report and agreed with his assessment regarding the Claimant's May 8, 2004, injury. (EX 39.) He also stated that after review of Dr. Mansheim's report, he did not believe further psychiatric evaluations were necessary. (EX 39.)

The Claimant alleges that because he has found doctors that will examine him, that proves he needs more medical treatment. (Cl. Letter of October 18, 2006.) However, the simple fact that the Claimant has been examined by these doctors does not prove the Claimant requires further treatment for his work-related injury. No physician who has seen the Claimant since May of 2006, has indicated that further treatment is necessary for his work injury.[13] In fact, Dr. Mest opined that there was nothing he could do for the Claimant, the Claimant was "going to have to just deal with his foot," and he discharged the Claimant from his care. (EX 52.) He also stated that, although the Claimant was requesting narcotics, his foot and ankle were not severe enough to require narcotics for pain management. (EX 52.)

After review of the entire record, this Administrative Law Judge finds that any medical expenses the Claimant purportedly incurred for his work-related injury after the assessments of Drs. Mansheim and Ross are unnecessary, particularly in light of Dr. Quidgley's agreement with those opinions.[14] Accordingly, the Employer is not responsible for payment of any of the Claimant's unnecessary medical expenses incurred from May 17, 2006, and continuing, nor is the Employer required to reimburse the Claimant for the unnecessary medical expenses he paid out-of-pocket after May 17, 2006.[15]

[13] Dr. Quidgley did send the Claimant to see Dr. Mullinax, but noted that the Claimant was requesting the referral, that he did not think the Claimant had a rheumatological process, and that he was only sending him for evaluation to rule out a rheumatological process. (EX 26.) This indicates that Dr. Quidgley did not believe treatment by a rheumatologist was necessary for the Claimant's work injury.

[14] These unnecessary medical expenses include the emergency room visits detailed in CX 1-4, the visit to Dr. Mullinax, and the visits to Dr. Mest.

[15] The Employer also argues that the Claimant is not entitled to further medical benefits because of his refusal to cooperate with Dr. Quidgley's treatment efforts. (TR at 8; cover sheet to EX 1-53.) Section 7(d)(4) of the Act provides that if the claimant unreasonably fails to submit to medical or surgical treatment, the payment of further compensation may be suspended during such time the refusal continues, unless the refusal was justified. 33 U.S.C. § 907(d)(4). However, such suspension may not be applied retroactively and does not apply prior to the employer's raising the issue. *Dodd v. Newport News Shipbuilding and Dry Dock Co.*, 22 BRBS 245 (1989). From the record, it appears as though the Employer did not raise this issue until hearing. (TR at 8.) Since it has been determined that there is no further medical treatment necessary for the Claimant's May 8, 2004, work-related injury, this issue is moot.

Moreover,

> [n]o claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

33 U.S.C. § 907(d)(2). The Director and Administrative Law Judge may excuse the physician's failure to submit a timely report when good cause is shown. 20 C.F.R. § 702.422(b) (2003); *Slattery Assoc. v. Lloyd*, 725 F.2d 780, 787 16 BRBS 44, 54-55 (CRT) (D.C. Cir. 1984). There is no evidence in the record demonstrating that either Dr. Mullinax or Dr. Mest complied with this provision. On the contrary, there is evidence tending to show that the Employer did not know about Dr. Mest until more than a month after he saw the Claimant. (TR at 28; EX 49, 52.) Further, the Claimant has not shown good cause as to why their failure to submit timely reports should be excused. Therefore, even if these physicians had indicated treatment was necessary for the Claimant's work-related injury, 33 U.S.C. § 907(d)(2) bars the Claimant from seeking payment for or reimbursement of the medical expenses incurred from seeing Drs. Mullinax and Mest.

The Claimant also contends that he has been unable to see the physician of his choosing throughout the period of treatment for his work related injuries, and he is requesting that he be allowed to change physicians. Pursuant to 33 U.S.C. § 907(b), the claimant does have the right to choose a treating physician authorized by the Secretary. Once the claimant has made his initial choice, he cannot change physicians without the employer or district director's consent, but consent shall be given if the claimant's initial choice of physician was not a specialist, whose services are later deemed to be necessary. 20 C.F.R. § 702.406(a)(2004). In this case, the Claimant did initially choose his own treating physician, Dr. Cohn. (EX 3.) The Employer then consented to the Claimant's change of treating physicians to Dr. Warren, a specialist in foot and ankle surgery, when Dr. Cohn deemed it necessary. (EX 9.) The Employer further consented to the Claimant's treatment by Dr. Quidgley when Dr. Warren deemed it necessary for the Claimant to be evaluated by a pain specialist. (EX 9.) However, no other specialists have been deemed necessary by the Claimant's treating physicians at this point, because all of them have opined that the Claimant does not require further treatment for his work injury. Thus, the Claimant has not been denied his right to choose his initial treating physician under the Act and he is not now permitted to change physicians without the Employer or District Director's consent.

IV. THE EMPLOYER IS NOT ENTITLED TO SPECIAL FUND RELIEF PURSUANT TO 33 U.S.C. § 908(f).

When an employee becomes permanently and totally disabled, his employer will only be responsible for 104 weeks of disability benefits, if the employee had a pre-existing permanent partial disability that contributed to the permanent total disability. 33 U.S.C. § 908(f)(1) (2000); *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Langley)*, 676 F.2d 110, 112 (4th Cir. 1982). The remainder of the employee's disability benefits will be paid out of a special

fund set up under 33 U.S.C. § 944. 33 U.S.C. § 908(f)(2)(A). However, before the employer is entitled to § 8(f) relief, the employer must establish: (1) a pre-existing permanent partial disability; (2) that disability must be manifest to the employer; and (3) "the pre-existing disability must combine with the subsequent disability and contribute to the resulting permanent total disability." *Langley*, 676 F.2d at 114. Here, a permanent total disability status has not been established such that Special Fund relief is available. Accordingly, the Employer is not entitled to Special Fund relief pursuant to 33 U.S.C. § 908(f).

CONCLUSION AND FINDINGS OF FACT

After deliberation on all the evidence of record, including the post-hearing brief of the Employer's counsel and the Claimant's post-hearing letter, this Administrative Law judge finds:

1. The Claimant suffered a compensable right foot/ankle injury on May 8, 2004.

2. The Claimant's injury arose in the course of and out of his employment with Employer while loading and unloading a ship.

3. The Claimant gave timely notice to the Employer of the work-related injury.

4. The Claimant reached maximum medical improvement on March 14, 2005, and has a permanent disability rating of 19% with respect to his right foot injury.

5. The Claimant has not suffered a compensable psychiatric or psychological injury.

6. The Claimant has not suffered a compensable left foot, right knee, or low back injury.

7. The Claimant was temporarily and totally disabled from May 9, 2004, through March 14, 2005, inclusive.

8. The Claimant was permanently and totally disabled from March 15, 2005, to April 4, 2005, inclusive.

9. The Claimant has been permanently and partially disabled since April 5, 2005, and was entitled to permanent partial disability benefits for 38.95 weeks.

10. The Claimant's average weekly wage as of May 8, 2004, was $1,094.09, which equals a compensation rate of $729.39.

11. The Employer paid temporary total disability benefits at the rate of $630.94 per week from May 9, 2004, to April 4, 2005, inclusive.

12. The Claimant was underpaid $98.45 per week from May 9, 2004, to March 14, 2005, for the period of temporary total disability.

13. The Claimant was underpaid $98.45 per week from March 14, 2005, to April 4, 2005, for the period of permanent total disability.

14. The Claimant was underpaid $98.45 per week for a period of 38.95 weeks from April 5, 2005, for the period of scheduled compensation under 33 U.S.C. § 908(c)(4).

15. The Employer paid permanent partial disability benefits at the rate of $630.94 per week for 38.95 weeks beginning April 5, 2005, and ending January 4, 2006.

16. The Employer is not responsible for the payment or reimbursement of the Claimant's unnecessary medical expenses incurred after May 17, 2006.

17. The Claimant is not entitled to choose a new treating physician without the Employer or District Director's consent.

18. The Employer is not entitled to Special Fund relief pursuant to 33 U.S.C. § 908(f).

ORDER

It is hereby **ORDERED** that:

1. In accordance with the Act, the Employer shall pay compensation to the Claimant at a rate of $729.39 per week for the following periods:

    a. As temporary total disability compensation for the period of May 9, 2004, to March 14, 2005.
    b. As permanent total disability compensation for the period of March 15, 2005, through April 4, 2005.
    c. As permanent partial disability compensation for 38.95 weeks commencing April 5, 2005.

2. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the District Director shall be paid on all accrued benefits computed from the date on which each payment was originally due to be paid.

3. The Employer shall receive credit for any related disability benefits previously paid to the Claimant.

4. All monetary computations made pursuant to this Order are subject to verification by the District Director.

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ALAN L. BERGSTROM
Administrative Law Judge